United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1550

To be argued by

MARTIN JAY SIEGEL

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

CARMINE TRAUMUNTI, et al.
(JOHN SPRINGER)

Appellant.

----------x

DOCKET NO. 74-1550

BRIEF FOR APPELLANT

On appeal from a Judgment of the United States District Court
for the Southern District of New York

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-1550

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UNITED STATES OF AMERICA

-against-

CARMINE TRAUMUNTI, et al.
(JOHN SPRINGER)

Defendants-Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT FOR NEW YORK

BRIEF FOR THE DEFENDANT-APPELLANT JOHN SPRINGER

QUESTIONS PRESENTED

1. Was the arrest warrant issued on Dec. 3, 1973 void, and therefore the resulting seizure invalid in all respects.

2. Did the Trial Court abuse its discretion by allowing into evidence certain contraband seized on Dec. 3, 1973

3. Was it error for the government to make an inaccurate comment on the evidence.

4. Was the sentence of the Court unduly harsh and excessive.

STATEMENT PURSUANT TO RULE 28(i)

Pursuant to Rule 28(i) of the FRAP and order of the Court dated June 10, 1974, Counsel on behalf of Defendant-Appellant Springer joins with all other Defendant-Appellants on their respective points and agguments as it may inure to his benefit.

STATEMENT PURSUANT TO RULE 28(3)

John Springer appeals from a judgment of the United States District Court for the Southern District of New York, rendered March 13, 1974, convicting him after trial(Duffy, T. and a jury) of one count of conspiracy to violate the Federal Narcotics Laws and one count for possessing herion (1/8 of kilogram) in Nov, 1971 with intent to distribute. He was sentenced to a term of imprisonment of 15 years on each count, each sentence to run concurrently.

STATEMENT OF FACTS

Counsel for Defendant-Appellant Springer joins with all other appellants on the general statement of facts. In addition, the specific facts as they are relevant to appellant are as follows:

Mr. John Springer was indicted by a Federal grand jury in Oct, 1973, charged with violation of the Federal narcotics laws. The evidence adduced at trial of criminal acts allegedly by the appellant consisted primarily of one government informer.

Mr. John Barnaba, a major drug dealer turned government informer testified that in Aug, 1971, he gave a package (contents not testified to) to John Springer. Mr. Barnaba further testified that in Nov, 1971 he sold 1/8 of a kilogram of herion to Mr. Springer for $3500.

There was testimony from Thomas "Tennessee" Dawson that he was once in an apt. with an individual by the name of Hank and snorted cocaine. However he could not identify this person in Court. This incident allegedly occurred in approximately May, 1971.

Mr. Harry Pannerello testified that he once discussed the general subject of narcotics with Mr. Springer in May of 1971.

Toward the conclusion of the government's direct case the prosecution over the strenuous objection of defense counsel, introduced certain narcotics and related contraband which was seized approximately 2 months after the appellant was arraigned on the indictment. Although a superseding indictment was handed down four days after the seizure, no mention was made of it.

At the time appellant was arraigned and subsequently released in his own recognizance in Oct, 1973, no specific date

was set for his return to court. Subsequently a telegram was sent directing him to appear on Nov. 16,1973, which was in fact never received by the appellant. Another telegram was sent advising him to appear on Nov. 26,1973. When he did appear on that date, although late, he was advised by Mr. Walter Philips, the AUSA in charge of the case to retain an attorney and have him file the appropriate notice of appearance within the the next few days(Vol S(6) 572).

During the next few days Mr. Philips had conversations with Mr. Norman Morskosky, an attorney, appellant had attempted to retain. Mr. Morskosky never filed a notice of appearance.

On Friday Nov. 30, 1973, Mr. Philips sent Mr. Springer a telegram directing him to appear on the following monday Dec. 3, 1973, at his office with his attorney. Upon the failure of the appellant to appear, Mr. Philips requested Judge Duffy issue a bench warrant.

State and federal agents went to the appellant's residence to execute the warrant. They were led by Sgt. Martin O'Boyle. At the trial, over the objection (T(27) 3464-8,77-8), Sgt. O'Boyle testified that as he entered the apartment house where appellant purportedly dwelled, he looked up a flight of steps and observed the appellant's wife standing by a partially opened door. Beyond the wife, still making the observations in an upward angle, he testified that he observed the appellant standing

by a table in the apartment, upon which he observed white powder and aluminum foil. The wife then shut the door. These observations occurred within five second period of time.

The officers then broke down the door and next observed the appellant in the bathroom with the door shut. On the table and floor in the kitchen certain contraband was recovered by agent Cassella. The appellant was then placed under arrest and subsequently indicted for violation of the narcotics laws of the State of New York.

The defendant-appellant did not testify nor offer any evidence in his own behalf, but rather rested on the presumption of innocence.

POINT 1

WAS THE ARREST WARRANT ISSUED ON DEC. 3, 1973 VOID, AND THEREFORE THE RESULTING SEIZURE INVALID IN ALL RESPECTS.

The appellant argues first that the bench warrant (Pg 1 , Springer Appendix) issued by the Court on Dec. 3,1973 is void.

A bench warrant is to be issued by a Judicial Officer only when an individual who has notice of a Court appearance fails to appear. (18 USC 3146(c). Pursuant to 18 USC 3152 the term "Judicial Officer is any person or Court authorized pursuant to 18 USC 3041 to bail or otherwise release a person before trial or sentencing or pending appeal in a Court of the US". A Assistant US Attorney is excluded from that definition. An AUSA, under the law, does not possess the sole authority to determine when a person should appear in Court. Further for failing to appear before him does not make one subject to a Bench Warrant being issued.(US v. West, CANC, 1973 477 F2d 1056)

The record is barren of any direction by Judge Duffy to Mr. Philips on Nov. 16, 1973 to have the appellant appear before him on any specified day, or for that matter any reference to Springer in general.

The Court in its opinion(Vol S5, Pg1-5) stated that he had the power to issue a warrant under Rule 9a of the FRCP.

The warrant, appellant contends, was defective on its face for at least one major reason. Rule 9b(1) of the FRCP provides in part:

"The form of the warrant shall be as provided in Rule 4(b)(1), except that it shall be signed by the clerk, and it shall describe the offense charged in the indictment or information."

The warrant states that the defendant John Springer is to be arrested for violation of 18 USC 3150, which is for failure to appear in Court. However the record is barren of any indication that an indictment or information was filed for violation of the aforementioned statute. The record is empty of any evidence as to any sworn oath being given by the AUSA in support of the warrant being issued to Judge Duffy. Without the prerequisites as outlined in the Statute, the warrant is without force and effect. Criminal Procedure under the Federal Rules by Lester Orfield,Vol 1, 9: 18, 20(1966). See also US v. Grady (1950 CA 7 Ill) 185 F2d 273,4. US v. Hughes (1962 CA3 Pa) 311 F2d 845. US v. Kennedy(1946, DC Colo) 5 FRD 310,11. US v. Pickard(1953, CA9 Nev) 207 F2d 472.

We have no knowledge as to what actually occurred on Dec. 3, 1973 when appellant failed to appear. There apparently was no stenographic report taken of the proceedings. We do not know what transpired or what representations were made by the AUSA to

the Trial Judge.

There is no evidence that the appellant had knowledge, actual or constructive, that his presence was required on Dec. 3rd. Further there is no evidence that his absence was wilful.

Without some evidence tending to show that the appellant intentionally failed to appear in Court when so directed or had some reason to believe that he was due in Court, the Trial Judge abused his discretion by issuing a void warrant contrary to Statute.

One issue which should be considered is whether the appellant had reasonable notice to appear in Court. Mr. Philips represented to the Court that he had sent a telegram to the appellant on Friday Nov. 30, advising him to be present in Court on Monday Dec. 3. This in itself, is unreasonable notice. US v. Depugh,(CA MO. 1970) 434 F2d 548, Cert denied 401 US 978. A definition,suggested by Counsel, of reasonable notice is that time period which would necessary for appellant to adequately present himself in Court at a required date, time and place. A telegram, which under today's standards is an unpredictable means of communication, particularly whose destination is the East Bronx cannot be construed as reasonable notice for the extremely short period of time involved.

Counsel for the appellant implores this Honorable Court to declare that the warrant is void and the resulting seizure illegal and to reverse the conviction of the appellant

POINT 2

DID THE TRIAL COURT ABUSE IT'S DISCRETION BY ALLOWING INTO EVIDENCE CERTAIN CONTRABAND SEIZED ON DEC. 3, 1973.

During the Prosecution's direct case, the contraband seized on Dec. 3, 1973 was introduced, over objection, into evidence. The relevant facts with that presentation are as follows;

Ptl Al Cassella, testified that on Dec. 3, he seized various types of narcotics and related paraphernalia. However when he was asked by AUSA Thomas Engel to identify the individual who was present when the evidence was seized, he without hesitation identified the appellant Warren Robinson(T27, 3571-4), not Mr. Springer. The government offered no further witnesses to show that the subject contraband was seized from the possession or control of the defendant. Sgt. O'Boyle testified that he arrested Springer, but was never asked to identify the contraband as what was recovered. O'Boyle never testified what was seized on that fateful day. As a result there was absolutely no government testimony connecting the contraband with the appellant. and it should have been kept out.

The Court in it's charge(Vol T-37,5284) instructed the jury that they were not to consider the contraband in determing the guilt of the appellant respect to either pertinent

count of the indictment. Rather they were to consider the evidence soley on the issue of whether the appellant intended to distribute narcotics as charged in the possession count.

This, it is contended is an erroneous and misleading charge. To ask a jury composed of twelve laymen to strain evidence to find intent and not guilt on one count, and not to consider it at all on the other count, is asking more than a jury can do. The introduction of the evidence does nothing more than cloud the issues and unduly prejudice the rights of Mr. Springer from having the jury fairly evaluate the evidence against him.US v. Windsor(CA MD 1969) 417 F2d 1131.

The evidence in question cannot in fairness to appellant, show intent as to what occurred over two years previous to the Dec arrest. It is conceded that Courts have held where there is a similarity in the crime charged and a closeness in time, then evidence of uncharged criminal acts may be introduced. US v. Windsor, supra., US v. Lewis 423 F2d 457.

However in the case at bar, there may be no reason except to prejudice the appellant by admitting the evidence. The seizure occurred over two years since the date charged in the possession count and for that matter since any alleged narcotics involvment whatsoever. To have a body of laymen determine that because at the time of appellant's arrest in Dec, 1973 he was in

an area where contraband was found, that he therefore intended to possess heróin in Nov, 1971 is incongruous and highly improper.

Generally evidence of prior or unrelated crimes are not admissible to show disposition, propensity or proclivity of an accused to commit the crime charged. US v. DeCicco 435 F2d 478 (1970)CANY). In his concurring opinion Justice Lumbard states, citing US v. Smith 283 F2d 960(1960), the following:

"The rule regarding the admission of evidence of similar crimes can be simply stated. Such evidence, because of it's highly prejudicial nature is not admissible until the defendant has raised the issue of intent or motive". In the instant case, the appellant, at no time raised the issue of motive or intent. It is readily conceded that it appellant would have testified or produced evidence as to his good character or his lack of involvment with narcotics, then the prosecution would have been within their right to introduce the subject contraband. US v. Fresia (7th Cir 1969) 419 F2d 1020.

POINT 3

WAS IT ERROR FOR THE PROSECUTION TO MAKE AN INACCURATE COMMENT ON THE EVIDENCE.

During the government's summation, Mr. Curran made certain inaccurate and misleading statements about the evidence.

For example, the prosecutor stated that Dawson(T-36, 5048) had discussed narcotics and snorted cocaine with appellant-Springer in the latter's apartment. This is contrary to the evidence adduced at trial.

The testimony at trial was that Dawson was in an individual's house by the name of Hank. But when asked to identify the person he was unable to. There is no testimony as to whether this Hank was black or white or resembled the appellant Springer(Vol T-19, 2616-7).

Another shocking example is the prosecutor's variance with the truth in his prejudicial comment on the Dec, 1973 contraband which was discussed at length in Point 1. During the summation (Vol T-36, 5066) Mr. Curran attempted to link the contraband with appellant's alleged narcotics transactions with Barnaba. There is no proof that the contraband had any connection with Barnaba. The Court allowed the evidence in just for the sole purpose to show intent and not for any other purpose. The manner and

style that Mr. Curran zeroed in on the evidence, severly prejudiced the minds of the jury against the appellant.

When a prosecutor deliberately and unfairly misstates the evidence than reversible error may insue.US v. White(CANY 1973) 486 F2d 204.,US v. LaSorsa 480 F2d 522, US v. Jones 482 F2d747,(CADC 1973).

POINT 4

WAS THE SENTENCE OF THE COURT UNDULY HARSH AND EXCESSIVE.

The Court sentenced the defendant-appellant to the maximum allowable sentence under law: 15 years on each count. The record as a whole, indicates that if the prosecution's proof is to be totally believed, then appellant was a minor underling. The record is incomplete as to a showing that appellant's criminal conduct warranted the unduly harsh sentence.

The Court in sentencing, alluded that one consideration was that the appellant was arrested apparently packaging narcotics(Appendix, Pg 2 , Sentencing minutes). Sgt. O'Boyle's testimony was that he observed appellant standing by a table where there was white powder, but the appellant was doing nothing. He further testified that when he broke into the apartment he saw the defendant in the bathroom.

For the sentencing Judge to consider conclusions which have no basis in the record is improper. Counsel contends that if the conviction is affirmed, then the appellant must be re-sentenced. US v. Woolsey 478 F2d 139(1973 CA IND).

If this Court considers the sentence of the appellant in light of the other appellants in this case, a wide disparity is evident. Other minor participents received sentences as follows:

Salley-5years, Robinson-7years, Ware-5 years probation, Alonzo-5years, For the alleged major participents the sentences were: Pugliese-10years, Gamba-10years, Traumunti-15years.

This Court has the power to review a sentence within the statutory maximums, if the trial judge abused his discretion. US v.(CANY 1969) 412 F2d212, 214-5, US v. Latimer (6th Cir 1969) 415 F2d 1288, 1290, US v. Weiner (5th Cir 1969) 418 F2d 849, 851.

An excessive sentence within the maximum statutory term, may be subject to review by this Court pursuant to its power to supervise the administration of justice. FRCP Rule 32, US v. Holder, supra, 25 Rutgers Law Review 207(1971).

The presentence report, which was made available to counsel, contained no information which would have caused the Trial Judge to sentence appellant to that severe term. Generally the report speaks favorably of the appellant, except in the last portion where a term of imprisonment is recommended. No mention is made of appellant's threat or danger to the community, serious past involvment with the law, etc. Dissent by Judge Lay in US v. Dace 15 Crl 2331.

Therefore Counsel urges that in the event this Honorable in it's ultimate wisdom resolves to affirm the lower Court conviction, that it weight the arguments of Counsel for a reduction of sentence for the accused.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed and the indictment dismissed.

Respectfully submitted,

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ATTORNEY FOR DEFENDANT-APPELLANT SPRINGER